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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-842

TIIDEE PRODUCTS, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONSE TO BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Both of the briefs in opposition (Bd. br., p. 4; Union br., pp. 6-7) acknowledge that the instant petition presents the precise question which this Court expressly left undecided in *N. L. R. B.* v. *Food Store Employees Union*, 417 U. S. 1, 8 n. 9 (1974)—whether the Labor Board has the authority to require a respondent to reimburse a charging party for litigation expenses. The Respondents argue, however, that this issue does not warrant review, first, because there are no conflicting decisions of other Circuits in as much as Tiidee is, to date, the only respondent

to be subjected to a reimbursement remedy (see pet. p. 3, n. 1) and, second, because the decision below is correct. Neither of these contentions have merit.

1. The Board's authority to grant a reimbursement remedy raises a problem of recurrent and far-reaching significance which, as has been recognized in other contexts (see pet. p. 10, n. 13), should be resolved by this Court. It is a question which has already arisen in numerous cases[1] and will continue to arise[2] until there is a Supreme Court decision. In these circumstances, postponing a determination until there is a Court of Appeals conflict would fly in the face of sound judicial administration and further perpetuate the present dislocation in our national labor policy.

2. The decision below, as demonstrated in the petition (see pp. 11-14), is not in accord with the decisions of this Court.

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1. See note 1 of the instant petition which sets forth numerous recent cases in which the Board considered whether to impose a reimbursement remedy. Moreover, upon remand of *Food Store Employees*, the Board in *Hecks, Inc.*, 215 NLRB No. 142, affirmed its policy to continue to impose such a remedy. See also *N. L. R. B.* v. *Local 396, Teamsters*, ... F. 2d ....., 88 LRRM 2589 (9th Cir. Jan. 22, 1975), where the Court of Appeals, on the basis of the decisions in this case and in *Food Store Employees*, upheld the Board's power to award reimbursement of litigation expenses to employees who were not properly represented by their Union, and who therefore were entitled to retain independent counsel to represent them in an arbitration proceeding; and *Gasoline Retailers Association of Greater Chicago*, 210 NLRB No. 58 (1974), where the Board ordered a respondent union to reimburse employers who, as a result of the Union's unfair labor practices, had paid to the union various exactions.

2. The continuing nature of this controversy is further demonstrated by the distribution on January 22, 1975 by the General Counsel of the Board of a memorandum (reprinted at 88 LRR 136) to the Board's Regional offices, directing them, in certain circumstances, to seek remedies requiring reimbursement of expenses to a charging party. The memorandum notes that in two pending contempt cases the Board is presently seeking a reimbursement remedy and requires that "*[b]ecause the basis for this remedy is not clearly established in present Board law*, and in order to provide for uniform application of our quest for this remedy," that Regions seeking such a remedy should obtain prior Washington clearance. 88 LRR at 137 (emphasis added.)

a. The imposition of a remedy requiring a respondent to reimburse a charging party for litigation expenses disregards the public nature of Board proceedings and the limits on the remedial authority of the Board. In *Emporium Capwell Co.* v. *Western Addition Community Organization*, Nos. 73-696 and 73-830 (decided February 18, 1975), this Court observed that:

> "once the General Counsel of the NLRB decides to issue a complaint, vindication of the charging party's statutory rights becomes a *public function* discharged at *public expense* . . ." [emphasis added].

The Board's power to discharge this public function is not without restriction. While the Agency may have "broad discretion", as the briefs in opposition argue (Bd. br., p. 5; Union br., p. 7), it may not impose remedies which are either punitive or imposed solely for their deterrent effect. *Republic Steel Corp.* v. *N. L. R. B.*, 311 U. S. 7, 12 (1940). It is this very punitive objective and deterrent effect, however, which is the basis for the Board's decision in the instant case.

b. The Union, apparently acknowledging the absence of any provision in the Labor Act permitting the Board to award a reimbursement remedy, contends that the American Rule, which requires, in the absence of certain narrow and inapplicable exceptions (see pet., pp. 13-14), that there either be an underlying contractual or statutory foundation (see pet., p. 11), should be abandoned in favor of the more permissive English Rule. (Union br., pp. 7-8). This assertion asks this Court to do what it has recently specifically declined not to do; ". . . to go the last mile . . . to judicially obviate the American Rule . . ." *F. D. Rich Co.* v. *Industrial Lumber Co.*, 417 U. S. 116, 130 (1974). Here, as in that case, the Court should reject such a change and disapprove of any deviation from the numerous decisions of this Court which have uniformly applied the American Rule.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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SUPPLEMENTAL BRIEF

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SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI

Petitioner Tiidee Products, Inc. files this supplement to its petition for writ of certiorari to discuss this Court's May 12, 1975 decision in *Alyeska Pipeline Service Co.* v. *Wilderness Soc.*, No. 73-1977, 43 U. S. L. W. 4561, which Petitioner believes further demonstrates the necessity of granting the instant petition.

1. In *Alyeska*, this Court reaffirmed its commitment to the "American Rule" with respect to the award of attorneys' fees, i.e., that the prevailing litigant is ordinarily not entitled to collect reasonable attorneys' fees from the loser, and declined to create exceptions to that Rule unless based upon specific legislative authority. The Court observed that the American Rule "is deeply rooted in our history and in congressional policy; and it is not for us to invade the legislature's province by redistributing litigation costs in the manner suggested. . . ." 43 U. S. L. W. at 4564, 4571. This principle surely is even more applicable in the instant case; here an administrative body whose sole authority is based on its enabling statute has nevertheless sought to carve out an exception to the American Rule without any legislative authority therefore. Such an exception, if allowed to stand, "would make major inroads on a policy matter that Congress has reserved for itself," *Alyeska*, 43 U. S. L. W. at 4570, and would thus be in direct conflict with this Court's decision in *Alyeska*.

2. In the present case, as in *Alyeska*, there is an absence of statutory authority to support an award of attorneys' fees. In both instances, "the approach taken by Congress to this issue has been to carve out specific exceptions to a general rule . . . [and] courts [as well as administrative agencies] are not free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation . . ." *Ibid.* And the Court below, which was the original proponent and sponsor of the exception to the American Rule created by the instant case, played a similar role in *Alyeska*. The *Alyeska* decision, accordingly, further underscores the necessity of a resolution by this Court of the critical question left unanswered in *NLRB* v. *Food Store Employees Union*, 417 U. S. 1 (1974)—

whether the Labor Board is empowered to grant, by administrative fiat, a reimbursement of litigation expenses. Alternatively, Petitioner suggests that if this Court concludes not to grant review herein, it remand this case to the Court of Appeals for further consideration in light of *Alyeska*.

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